

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL CASE NO. HBA 004 OF 2024

BETWEEN : **TAJ MOHAMMED KHAN SHERANI**
Appellant

AND : **ISIRELI FA TRADING AS FA AND COMPANY**
Respondent

Appearances : **Ms P Singh for the Appellant**
Mr I Fa (Junior) for the Respondent

Date of Hearing : **2 July 2024**

Date of Judgment : **3 July 2024**

EXTEMPORE JUDGMENT

(Summons to enlarge time to file appeal)

- [1] This is an application by the Appellant to enlarge the time to file an appeal from a decision of the Magistrates Court issued on 10 January 2024.
- [2] The issue before the Magistrates Court concerned the Respondent's application for discovery of a Deed of Settlement. The learned Magistrate determined that the document was relevant, thus granting the Respondent's application. The Appellant was dissatisfied with the decision and seeks to appeal the same to the High Court. However, the requisite notice of grounds of appeal was filed late and, as such, the Appellant seeks an enlargement of time to do so.

- [3] The Respondent raises a preliminary issue. It says that the enlargement cannot be granted as the Appellant has failed to file and serve his notice of intention to appeal, being a prerequisite to any filing of the appeal.

Background

- [4] The proceeding commenced with the filing of a Statement of Claim by the Respondent/Plaintiff in October 2021. The Respondent is a law firm. The Appellant/Defendant instructed the Respondent to act for him and institute proceedings in the High Court in relation to a family estate matter. The proceedings were filed in 2018, being HBC No. 332 of 2018. For the next three years, the Respondent represented the Appellant in those proceedings, issuing invoices from time to time, primarily in 2018 and 2019. Some six invoices were rendered, and each was paid in full by the Appellant.
- [5] In April 2021, the Appellant informed the Respondent that he had settled the proceeding himself. That same month, the Respondent rendered a final invoice to the Appellant in the amount of \$19,701.44. The Appellant did not pay the invoice, and, therefore, the Respondent brought these proceedings against the Appellant in the Magistrates Court to recover the outstanding fees, as well as interest and costs.
- [6] The Appellant filed a Statement of Defence in November 2021, contesting the proceedings on the basis that he says that the legal fees claimed were excessive. In November 2022, the Respondent filed an application for discovery of the Deed of Settlement in HBC No. 332 of 2018. The Deed had been executed by the Appellant and the Respondent did not have a copy. The Appellant opposed discovery and the dispute went to a hearing in November 2023. A decision followed on 10 January 2024. The learned Magistrate had the benefit of perusing the Deed of Settlement. He stated:

17. Upon perusal of the Deed of Settlement the Court notes that there is a reference to High Court civil action number HBC 332 of 2018 in the Deed of Settlement.

18. Consequently the Court is of the view that there may be some correlation and relevancy to the matter in question and this action on that basis made the order at paragraph 19 to which I've already referred.

- [7] The next events are key to the present application to be determined. The Appellant filed a Notice of Intention to Appeal in the Magistrates Court. There are two date stamps from the Magistrates Court on the document, one is dated 17 January 2024 and the other is dated 24 January 2024. There is no dispute that the Notice was not served on the Respondent by or before 17 January 2024.
- [8] On 31 January 2024, the Appellant filed a notice of the grounds of appeal. The notice was filed in the Magistrates Court. Both parties agree that it should instead have been filed in the High Court. The reason for the oversight was that the intituling page incorrectly recorded the Court for filing as being the Magistrates Court and not the High Court and the clerk employed by the Appellant's solicitors therefore filed the document with the wrong Court. The notice of grounds of appeal should have been filed with the High Court by 10 February 2024, being one month after the decision from which the appeal is brought. When the oversight came to the attention of the Appellant's solicitors, they filed the present Summons on 10 April 2024 seeking an enlargement of time. The supporting affidavit by the Appellant annexes all the material documents including the learned Magistrate's decision.
- [9] The Court has discretion where the grounds of appeal are filed late to extend the time for a party to file the same.¹ The factors for the Court to consider are the length of the delay, the reasons for the delay, the merits of the proposed appeal, and any prejudice to the other party. The overriding and paramount factor is the interests of justice.
- [10] I do not need to decide whether the Appellant has satisfied the test for the exercise of this discretion. The reason is that the Respondent has raised a preliminary issue which, in my view, determines the present application.

¹ O.37, r.4 of the Magistrates Court Rules 1945.

[11] The Respondent says that pursuant to O.37, r.1 the Appellant was required to file and serve notice of his intention to appeal within seven days of the decision appealed from, here this period expired on 17 January 2024. The Respondent says that the Appellant failed to do both and that this failure is fatal to the Appellant's present summons for an enlargement of time.

Relevant provisions

[12] Order 37 of the Magistrates Court Rules 1945 sets out two steps that an intended appellant must follow in respect to an appeal. The first step under r.1 is that the party must file a notice of intention to appeal and serve the same within seven days of the decision. It may do so verbally in Court when the decision is made or it may do so in writing but it must do so within seven days of the decision. The second step, under r.3, is that the intended appellant must file their grounds of appeal within one month of the decision. Failure to file the grounds of appeal within one month is treated as an abandonment of the appeal but the Court has discretion to enlarge the time within which to file the same.²

[13] As I said, both steps must be satisfied. Even if the second step is satisfied, the appeal is not properly brought where the first step has not been satisfied.

Decision

[14] The preliminary question is whether the Appellant satisfied O.37, r.1, and, if not, whether this Court has power to fix the defect.

[15] The Respondent argues that the Appellant failed to both file and serve the notice of intention to appeal within seven days. I am satisfied that the Appellant did file his notice within seven days as is evidenced by the 'Magistrate's Court Civil' stamp found on the document.³ However the Notice was not served on the Respondent within seven days and for this reason the Appellant failed to comply with O.37, r.1.

² Under O.37, r.4.

³ Annexure TS 11 of Affidavit of Taj Mohammed Khan Sherani dated 9 April 2024.

[16] There are two schools of thought on whether the High Court has power to cure the defect. The first is that failure to comply with r.1 is fatal. That is the position of the Respondent who relies on the decision by Pathik J in *Crest Chicken Ltd v Central Enterprises Limited* [2005] FJHC 87 (19 April 2005). The learned Judge was considering a similar issue, being whether the Court had discretion to enlarge time where a party had failed to comply with the requirement to file a notice of intention to appeal within the requisite time. Pathik J stated:

*This is a **mandatory Rule** and it does not give the Magistrate power to extend time. Even if he had, no application was made by the appellant for extension for it was already late in filing and giving Notice of Intention to appeal within these seven days after judgment was pronounced.*

*Had the legislature intended it could have specifically provided for application to extend time. It did not do so in Or. 37 R.1 but **Or.37 R. 4** which provides as follows gave the Magistrates Court power to extend time to file **grounds of appeal**.*

[17] The conclusion by Pathik J reads:

*In the outcome, for the above reasons, the appeal before the Court is **invalid** for noncompliance with the **mandatory** provisions of **Or.37 r.1** of the Magistrates Court Rules. There was never at any time an application to apply for extension of time to give Notice of Intention to Appeal out of time or to file Grounds of Appeal. This was a *sine qua non* to enable the learned Magistrate to consider the stay application herein.*

[18] On my reading of the *Crest Chicken* decision I am not convinced that Pathik J was stating that there is no discretion available to the Court to fix a breach of O.37, r.1. The learned Judge appears to have left open that door when he stated that the appellant in that case had failed to apply for an enlargement of time.

[19] Nevertheless, it seems that several decisions from this Court have taken a different interpretation of Pathik J's decision since 2005, being that failure to comply with r.1 is fatal and there is no power available to the High Court to fix the same.

[20] Other decisions from this Court have expressly taken a contrary approach, determining that there is in fact discretion available to the High Court to enlarge time where there has been a failure under r.1. I refer, here, to the decision by Brito-Mutunayagam J in *Seru v Credit Corporation (Fiji) Ltd* [2016] FJHC 770 (29 August 2016). The issue in this case was identified as follows by the learned Judge at paragraph 2:

The question for determination in this application is whether the time limit for filing notice of intention to appeal under Order 37, Rule 1 of the Magistrates Court Rules may be extended.

[21] The learned Judge referred, at paragraphs 6 to 9, to the *Crest Chicken* decision as well as other authorities. Brito-Mutunayagam J proceeded at paragraph 10 to state:

The principle may be deduced from the cases I have cited is that while Or 37, r 1 is mandatory as to the time period within which notice of intention to appeal is required to be filed, Or 39 [sic]⁴ gives the High Court the discretion to entertain an appeal if it thinks just on a consideration of the five factors identified for consideration in belated applications.

[22] The Court then considered the factors relevant to the exercise of the discretion to enlarge time. The Court determined that it would not extend the time because the appellant in that case had not satisfied the criteria for the exercise of the discretion. Notwithstanding, the learned Judge accepted, having considered the previous decisions on the issue, that the Court does have power to extend the time where there has been a failure to comply with O.37, r.1. This approach was also taken by Tuilevuka J in *Konkoen v Naidu* [2022] FJHC 101 (2 February 2022). Having considered the previous authorities, including

⁴ That should be s 39 of the Magistrates Court Act.

Crest Chicken Ltd v Central Enterprises Limited, the learned Judge stated at paragraph 13:

I conclude by simply saying that, after reviewing the above authorities, the better and more dominant view in Fiji is a departure from the view of Pathik J in Crest.

[23] I respectfully agree that the Court does have power to cure a failure by a party to satisfy O.37, r.1. There are two reasons for this. First, a rigid application of the provision that does not allow the Court to fix such defects may result in manifest unfairness in some cases. Such a construction is also out of keeping with the powers afforded the High Court under the High Court Rules to fix irregularities and extend time (for example, O.2 and O.3, r.4). If a strict approach is taken, what that means is that a party who has, for whatever reason, failed to file and serve a notice of intention to appeal within the relatively short time allowed of seven days, will not, under any circumstances, be permitted to bring an appeal from the Magistrate's decision.

[24] The second reason is this. Section 39 of the Magistrates Court Act provides a wide discretion to the High Court. It states:

Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a Magistrates' Court on any terms which it thinks just.

[25] The High Court has power under this provision to cure any non-compliance with O.37, r.1. If there is any contradiction or inconsistency between the mandatory requirement under r.1 and the power under s 39, then the latter must prevail as the Rules are subsidiary legislation to the Magistrates Court Act.⁵ The end result is that I accept that this Court does have a discretion to enlarge time where a party has failed to comply with O.37, r.1.

[26] The application before me, however, is not an application to enlarge the time to serve the notice of intention to appeal on the Respondent. It is an application to enlarge the time to

⁵ The Rules are enacted by virtue of s 68 of the Magistrates Court Act.

file the late grounds of appeal which was required to be filed by 10 February 2024, as per O.37, r.3.


[27] The Appellant cannot succeed with the present application where he has not first complied with the initial step of having filed and served his notice of intention to file an appeal. The appellant must first cure the defect with r.1 before this Court can consider enlarging the time under r.3. As such, I have no option but to dismiss the present application before the Court.

Orders

[28] For the reasons I have provided, I make the following orders:

1. The Summons by the Appellant filed on 10 April 2024, seeking to enlarge the time for the Appellant to file and serve his grounds of appeal, is dismissed.
2. There will no order as to costs. Costs are to lie where they fall.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Lal Patel Bale Lawyers for the Appellant

Fa & Company for the Respondent